(1936) 03 PAT CK 0004

In the Patna High Court

Mangtulal Bagaria APPELLANT

Vs

Daya Shanker Gobardhan Das Bhata and Others RESPONDENT

Date of Decision : 16-03-1936

Acts Referred:

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 7
Presidency Towns Insolvency Act, 1909 — Section 108
Specific Relief Act, 1877 — Section 42

Citation : AIR 1936 Patna 572

Hon'ble Judges : Rowland, J;Mohamad Noor, J

Bench : Full Bench

Judgement

Mohamad Noor, J.—The facts of the case out of which this second appeal has arisen are these: One Popat Velji had obtained from the Raja of Jharia a mining lease of village Parbad in the District of Manbhum. He then gave a mining sublease of 100 bighas of land of that village to defendant 1 on commission at a certain rate subject to a minimum royalty of Rs. 3,000 per annum. The plot of land so subleased is described as plot B in the schedule annexed to the plaint. This defendant, along with one Jethabhai Nira, also took from Popat Velji a sublease of another plot of land which is known as plot A, but we are not concerned with it in the present litigation. Popat Velji died on 9th November 1923. A dispute arose between his two widows on the one hand and his father Velji Mulji Rajdeo on the other. The former claimed that Popat Velji was separate from his father and consequently his properties devolved upon them, while the latter claimed that the deceased was joint with him and therefore he succeeded him by survivorship. In a certain suit (No. 1282 of 1923) pending in the original side of the Calcutta High Court in which Popat Velji was plaintiff, his widows were substituted in his place on 15th May 1924. Thereupon Velji Mulji Rajdeo, father of Popat Velji, filed a declaratory suit in the original side of the Calcutta High Court (suit No. 1307 of 1924) and in that suit, on 28th July 1924, Mr. N.N. Bose, Bar-at-law, was appointed receiver by the Court. Thereafter the two widows of Popat Velji (defendants 3 and 4 in the present suit) instituted an administration suit in the original side of the Calcutta High Court (suit No. 2156 of 1924). In that suit two creditors of Popat Velji, namely the plaintiff and one Sheochand Rai Khemka were appointed administrators on 23rd September 1924. On 24th November 1924, a preliminary decree was passed in the administration suit and the Court ordered certain enquiries and ascertainment of the assets and liabilities of the deceased. On or about 15th May 1925, the administrators were discharged and the Official Receiver was appointed manager of the estate of the deceased. He also was discharged on 11th March 1927, and the plaintiff was appointed manager of the estate and has been continuing as such since then.

2. Under the Jharia Water Supply Act Popat Velji was liable to pay certain cess to the Water Board in respect of the royalties which he was to receive from defendant 1. A certificate, No. 33 J.W.B of 1924-25, was filed on 25th July 1924, against the two widows of Popat Velji and his father. It was just three days before the appointment of Mr. N.N. Bose as receiver of the estate in the suit of the father. Notices u/s 7, Bihar and Orissa Public Demands Recovery Act, seem to have been served on the judgment-debtors on 14th August 1924. In March 1925, while the plaintiff and Sheochand Rai Khemka were in charge of the estate, they remitted a sum of Rs. 443-12-0 to Jharia Water Board for cess for the period subsequent to that for which the certificate had been issued. The Secretary of the Board informed the solicitors of the plaintiff and Sheochand Rai Khemka that a further sum of Rs. 920 on account of cess for the period of 1923 and 1924 was payable by the estate of the deceased. On receipt of this information the solicitors of the managers, the plaintiff and Sheochand Rai Khemka sent a cheque for Rs. 920 to the Certificate Officer of Dhanbad, requesting him that the costs and interest be remitted. On this the solicitors were informed that the interest was remitted but that the costs could not be remitted, and they were called upon to pay it. In the meantime, as already stated, the plaintiff and Sheochand Rai Khemka were discharged and the Official Receiver was appointed instead. The solicitors informed the Certificate Officer that the management of the estate had been transferred to the Official Receiver and requested him to communicate with him. Nothing seems to have been done and the balance of the certificate dues was left unsatisfied. The right of the judgment-debtors to realise commission and royalty in respect of Plot B of the land from Gobardhan Das Manishanker was attached on 19th December 1924, and sold on 2nd November 1925, for a sum of Rs. 160 and was purchased by defendant 2 who is the son of defendant 1. It is to be noted that at that time admittedly a sum of at least Rs. 6,000 in respect of royalty was payable by defendant 1 to the estate of the deceased Popat Velji.

3. The plaintiff after having obtained the sanction of the Calcutta High Court has instituted the present suit: (a) for a declaration that the sale of plot B described in Schedule 2 to the plaint in Certificate Case No. 33 J.W.B of 1924-25 is void and that defendants 1 and 2 acquired no title to the property by purchase in that sale; or (b) if the sale be held to be valid for declaration that the purchaser bought the property for and on behalf of the estate of the late Popat Velji; (c) for

costs; and (d) for such relief as the plaintiff may be found to be entitled to. The plaintiff alleged that defendant 2, who purchased the property at the certificate sale, was in fact a benamidar of his father, defendant 1. The defendants denied the allegations of the plaintiff and urged that defendant 2 was the real purchaser of the property and that the sale was valid and legal. I will mention here in passing that in the plaint there is an allegation that on 4th August 1934 the Official Assignee of Bengal was appointed administrator of the estate of Popat Velji by the Calcutta High Court u/s 108, Presidency Towns Insolvency Act, and that the appointment of Mr. N.N. Bose as receiver referred to above was revoked on 19th August 1924, and that it was later on that the plaintiff and Shewchand Rai Khemka were appointed administrators on 23rd September 1924 as already stated. This allegation of the plaintiff about the appointment of the Official Assignee was not admitted by the defendants and I do not find anything on the record to support it. Had there been any evidence that the official assignee was in charge of the estate by virtue of an appointment in insolvency proceeding the position would have been different and a number of questions which arise in this case would have been of no importance.

4. The learned Subordinate Judge held that defendant 2 was not an independent purchaser of the property and was in fact a benamidar of defendant 1. He decided the other issues involved in the suit in favour of the defendants but decreed it on the simple ground that the estate of Popat Velji, which was in the hands of the official receiver and administrators continuously since 28th July 1924, was not properly represented in the certificate proceedings and therefore the sale was not binding on the estate and was void against it. The learned District Judge however on appeal by the defendants has reversed the decree of the learned Subordinate Judge and has dismissed the suit. The plaintiff has preferred this second appeal. In my opinion on some points the decision of the learned District Judge is wrong. First of all he has held that the suit was not maintainable u/s 42, Specific Relief Act. He is of opinion that as according to the plaintiff the sale was void and a nullity against the estate of Popat Velji, no suit for a declaration lay as the declaration would be only of a proposition of law. He is clearly in error. There is nothing in Section 42, Specific Relief Act, which bars a suit for a declaration that a certain sale is void. The question whether a particular sale is void is a mixed question of law and fact, but whether under the given circumstances a sale is void is a question of law only. A plaintiff is entitled to sue for a declaration that certain facts existed and therefore the sale in that case is void.

5. The next ground of the learned District Judge for holding that the suit was not maintainable is that the plaintiff being entitled to consequential relief of recovery of possession could not sue for a declaration only, as the possession of the purchased property was delivered to defendant 2 on 14th February 1926, and according to him he had actually realized the minimum royalty from defendant 1 by virtue of his purchase. Here again the learned District Judge is wrong. The finding of both the Courts is that the real purchaser of the property was

defendant 1 himself, who was liable to pay the royalty. The formal delivery of possession to him has not changed his position if the sale was void or fraudulent. It cannot be said that he obtained possession by realizing the royalty from himself. In my opinion therefore, on the findings of fact, the plaintiff is entitled to maintain a suit purely for a declaration, the only thing which is needed under the circumstances of the case. The third ground of the learned District Judge for holding the suit to be not maintainable is that it is barred u/s 46, Public Demands Recovery Act, as there was no fraud in bringing about the sale. Section 46, Public Demands Recovery Act, refers to a suit for setting aside a sale. It has got no reference to a case in which the plaintiff alleges that the sale though good has not in fact affected him, as there was no decree against him.

6. The question of maintainability of a suit is to be dealt with on the footing of the case as presented by the plaintiff and on the assumption that his allegations are correct. If afterwards they are found to be incorrect the suit is liable to be dismissed not on the ground that it is not maintainable but on its merits. In the present case the plaintiff alleged fraud by defendant 1 and that allegation brought the case within the exception to Section 46, Public Demands Recovery Act. Then the plaintiff wanted a declaration that the sale was void against the estate of Popat Velji as it was not properly represented. There is wide difference between setting aside a sale and deciding that the plaintiff''s right was not affected by it: Moti Lal v. Karrabuldin (1898) 25 Cal 179. On the allegations in the plaint the suit was maintainable. If however these allegations have not been established the suit fails on the merits, and not on the ground that it is not maintainable. The learned District Judge has next dealt with the question whether the estate of Popat Velji was or was not properly represented in the certificate proceeding. He has held that it is not mandatory upon a Certificate Officer to substitute in the certificate proceedings the names of all persons on whom the estate may devolve. He observes:

The Certificate Officer cannot be expected to know the persons on whom the estate devolves and specially in a case like the present one whore, according to plaintiff''s own case, it devolved from time to time upon different persons.

7. As a proposition of law the view of the learned District Judge is wrong. It may be that the Certificate Officer is not bound to substitute the name of the person on whom an estate is devolved, but if in execution of a certificate a property is sold which does not belong to the certificate debtor nothing passes to the auction-purchaser. It is well settled law that a certificate has no greater force than that of a simple money decree and nothing is sold in execution of it except the right, title and interest of the certificate debtor mentioned therein. If a property which has devolved upon another person be sold as belonging to the certificate debtor mentioned in the certificate, nothing passes to the auction-purchaser. However, in this case, though the view of law taken by the learned District Judge is in my opinion not correct, the certificate sale cannot be held to be inoperative against the estate of Popat Velji. The receiver appointed in an

administration suit has no better status than that of a receiver appointed by Court under Order 40, Civil P.C. He is not on the same footing as a receiver appointed in an insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it.

8. The position of a receiver in a suit has been elaborately dealt with by Mookerjee, J. in Eastern Mortgage and Agency Co., Ltd. v. Muhammad Fazlul Karim 1926 Cal 385. When a Court appoints a receiver the property comes in the custody of the Court. The possession of the receiver is the possession of the Court. The property passes into legal custody (custodia legis) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of the true owners. By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed. Therefore the certificate debtors in this case, namely, the two widows and the father of Popat Velji (whoever may have title to the property) were not by the appointment of a receiver or manager divested of their interest therein.

9. Mr. Mullick has contended that when the property is in the possession of a receiver it cannot be sold in execution of a decree without the leave of the Court which appointed the receiver. This proposition is correct, but the person who brings about the attachment and sale of a property in the possession of a receiver appointed by a Court is guilty of contempt of Court and the sale is irregular but not void. The decision of the case in Mrs. Lavinia Ashton v. Madhobmoni Dasi 14 CWN 560, relied upon by the learned advocate for the appellant, merely lays down that the sale of a property in the hands of a receiver without the leave of the Court which appointed him is illegal and can be set aside even after it was confirmed, but it does not lay down that the sale is ab initio void. It was held in the Calcutta High Court in Kanailal Jalan v. Manoo Bibi 1919 Cal 269 51 IC 394 and Raja Jagadish Chandra Deo Dhabal Deb v. Bhubaneswar Mitra 1923 Cal 121 that the sale in execution of a decree of a property in the custody of a receiver without the leave of the Court which appointed him is not void but it can be set aside in a proper proceeding. The present case however is not one for setting aside the sale, and Section 46, Public Demands Recovery Act, confines the jurisdiction of a civil Court to cases where there is a fraud which according to the finding of both the Courts below is absent in this case.

10. The next branch of the argument of Mr. Mullick was that the defendants were liable to re-convey the property to the plaintiffs. He relied upon a decision of the Privy Council in Deo Nandan Prasad v. Janki Singh 1916 PC 227. But that decision does not help the appellant, as in this case there was no obligation on the defendants to pay up the certificate dues. No doubt the plaintiff''s case was that the defendants were liable to pay the water rate, but on reading the lease I agree with the Courts below that there was no such obligation on him. To support the plaintiff''s claim in equity there must be something unfair, something

amounting to at least sharp practice in the conduct of the purchaser: see Khurshed Ali v. Dina Nath Surma 1919 Cal 431. There is no such thing in this case. So far the result arrived at by the learned District Judge is correct.

11. There is however one aspect of the case which has not been considered by either of the Courts below, nor does it seem to have been raised before them by the plaintiff, but as it is a question of law it can be looked into in second appeal. I have stated that plaintiff wants a declaration that the sale of plot B described in Schedule 2 is void and that the defendants acquired no title to the property by purchase in that sale. It seems to have been assumed in the Courts below that the land of plot B described in the schedule was in fact sold and purchased by the defendants. As a matter of fact it is not so. The certificate of sale (Ex. E-2) describes the property sold in these terms:

The certificate debtors'' right to receive royalty and commission from Babu Gobardhan Das Manishanker Das Manishanker in 100 bighas coal land known as Basudih Colliery B plot situated at Mauza Parbad, etc., etc.

12. Now there is a good deal of difference between the sale of a plot of land and a right to receive royalty from the lessee of that land. What was attached and sold was the "right to receive the royalty," and not the land itself. A right to receive money can only be attached and sold as a debt and the debt must be existing, and not the money which is to come into existence at some future date. Sir Dinshaw Mulla in his commentary on the CPC u/s 60 says:

The word ''debt'' in this section means an actually existing debt, that is a perfect and absolute debt. Rent which has not become due is not a debt and cannot be attached.

13. In this case it is obvious that though the minimum royalty was a fixed sum, the commission depended upon the happening of circumstances which was entirely contingent. This seems to have been held in the Calcutta High Court in Uday Kumari Ghatwalin. Hari Ram Shaha (1901) 28 Cal 483 and in the Allahabad High Court in Lachhman v. Jarbandhan 1928 All 193. In this view of the matter and considering the description of the property sold, in my opinion what was actually sold was the money which had already become due on the date of the sale, that is on 25th July 1925. I would give the plaintiff a modified decree for a declaration that the certificate sale has not affected the plaintiff''s right in the land of plot B described in Schedule 2 of the plaint, and that the defendant has only purchased the royalty and commission which had already become due on 25th July 1925. In the circumstances of the case I would direct that the parties bear their own costs throughout.

Rowland, J.

14. I agree.

